

In the Matter of Dina Fancher, Monmouth County
DOP Docket No. 2006-2924
(Merit System Board, decided July 19, 2006)

Dina Fancher, a County Correction Officer with Monmouth County, represented by Charles J. Sciarra, Esq., petitions the Merit System Board (Board) for reconsideration of the attached administrative determination, rendered January 17, 2006, by the Director of Merit System Practices and Labor Relations (Director), denying her request for a hearing concerning the appeal of a 10-day suspension effective October 1, 2005, due to the untimely filing of her appeal pursuant to *N.J.S.A. 11A:2-15* and *N.J.A.C. 4A:2-2.8*.

The underlying facts of the matter are: The appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) dated July 28, 2005, charging her with being absent without leave on July 3 and 5, 2005, and recommending the penalty of a 10-day suspension. The PNDA also indicated that if she wanted a departmental hearing on the matter, one would be held on August 16, 2005. A Final Notice of Disciplinary Action (FNDA) dated August 22, 2005 upholding the charges and the 10-day suspension was sent to the appellant via certified mail, return receipt requested. The return receipt indicated that the FNDA was received at the appellant's address on August 25, 2005. The FNDA also indicated that a departmental hearing was held on August 16, 2005, and that the appellant's suspension would begin on September 3 and end on September 16, 2005. By letter postmarked September 23, 2005, the appellant filed an appeal of her suspension with the Board. Accordingly, the appellant's request for a hearing was denied by the Director, on the basis that the appellant's request for a hearing was not timely filed pursuant to *N.J.S.A. 11A:2-15* and *N.J.A.C. 4A:2-2.8*.

In support of her request for reconsideration, the appellant initially argues that she was not given notice of the charges against her prior to the imposition of a disciplinary penalty pursuant to Merit System law and rules and her collective bargaining agreement. She indicates that on August 26, 2005, after its receipt of the FNDA, her union filed a grievance relating to the procedures as to notification of the issuance of the charges against her. Specifically, her union grieved that it had not been notified of the charges against the appellant. It requested that the charges be withdrawn prior to her serving her suspension on September 3, 2005. In this regard, the appellant maintains that the charges against her should be dismissed because the FNDA was issued before the departmental hearing was held. She claims this is a gross violation of her due process rights. As a result of this grievance, the appointing authority held a second departmental hearing on September 9, 2005, again sustaining the charges. At the time of filing her

appeal on September 23, 2005, no FNDA based on the September 9, 2005 hearing had been issued to the appellant. Finally, the appellant asserts that her union was advised that a follow-up FNDA would not be issued.

In opposition to the appellant's request, the appointing authority, represented by G. Lance Herbert, Esq., argues that the appellant had notice of the charges against her as they were contained in the PNDA that was sent to the appellant via certified mail, return receipt requested.¹ The appointing authority also maintains that a departmental hearing was held on August 16, 2005 at which the appellant and Officer Germaine, a union representative, were present. The appointing authority acknowledges that the appellant's union filed a grievance concerning the suspension on August 26, 2005. The union complained that its collective bargaining agreement required that the union be given the same notice of the hearing as the employee. Subsequently, a new hearing was held on September 9, 2005, and the charges were sustained. It is noted that the appellant did not serve her suspension from September 3 to September 16, 2005 as originally scheduled. Based on the September 9, 2005 hearing, the appellant served her suspension from October 1 through October 14, 2005. On October 13, 2005, an amended FNDA was sent via certified mail to the appellant. Finally, the appointing authority argues that the appellant's claim that the matter should be dismissed because an FNDA issued before a departmental hearing is incorrect and without merit. Specifically, it reiterates that she was properly served with a PNDA and requested a hearing. A hearing was held on August 16, 2005, and she was represented by her union. Subsequently, the union filed a grievance regarding the notice requirement, and to accommodate the appellant, a second hearing was held and the charges were again sustained and an amended FNDA was issued reflecting that there was a second hearing.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which the Merit System Board may reconsider a prior decision. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. *N.J.S.A.* 11A:2-15 provides that any appeal from adverse actions specified in *N.J.S.A.* 11A:2-13

¹ While the appointing authority does not provide any documentation that the PNDA was received at the appellant's address, a review of the United States Postal Service website indicates that receipt number 7004 1160 0001 8123 4228, which matches the receipt on the PNDA, was delivered on August 2, 2005 in Jackson, New Jersey. The appellant lives in Jackson, New Jersey.

shall be made in writing to the Board no later than 20 days from receipt of the final written determination of the appointing authority. *N.J.A.C. 4A:2-2.8(a)* and (b) provide that an appeal from a final notice of disciplinary action must be filed within 20 days of the receipt of the notice by the employee.

The issue before the Board is whether the appellant's appeal of her 10-day suspension was timely filed. The appellant would have the Board believe that she had no notice of her departmental hearing and that she was served with an FNDA without the benefit of a hearing. The record does not sustain these contentions. The Board finds that the appellant received notice of charges against her via the PNDA received at her address on August 2, 2005. Moreover, the Board accepts that the appellant had a departmental hearing on August 16, 2005, and that as a result thereof, an FNDA was served via certified mail on August 25, 2005. If that were the end of the record, the Board would be compelled to deny the appellant's request for reconsideration as she would not have established that she filed her appeal in a timely manner pursuant to *N.J.S.A. 11A:2-15* and *N.J.A.C. 4A:2-2.8*. Specifically, the 20-day period in which the appellant would have had to file her appeal began to run on August 25, 2005 and ended on September 14, 2005. As such, filing her appeal on September 23, 2005 would be untimely. However, in this particular instance, the appointing authority granted the appellant's grievance and granted her a new hearing and issued an amended FNDA on October 13, 2005. Accordingly, the Board finds that the 20-day period to file an appeal began anew on this date. Had the appointing authority denied the appellant a new hearing, the original FNDA would have stood as issued and the disposition of her grievance could not have been presented to the Board. See *N.J.A.C. 4A:2-3.1(d)*. However, since the appointing authority chose to provide the appellant with a new hearing and FNDA, it is only appropriate that the process be taken through to its logical conclusion. In effect, the October 13, 2005 FNDA was "the final written determination of the appointing authority" within the meaning of *N.J.S.A. 11A:2-15*, not the September 22, 2005 FNDA. Therefore, the Board finds that the appellant timely filed an appeal of her 10-day suspension and her request for reconsideration is granted.

ORDER

Therefore, it is ordered that Dina Fancher's request for a hearing is granted and the matter be transmitted to the OAL for further proceedings.